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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

BRIEF OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION AS AMICUS CURIAE IN SUPPORT OF THE ZENITH RADIO CORPORATION PETITION FOR CERTIORARI

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The Committee to Preserve American Color Television hereby respectfully requests as amicus curiae that the United States Supreme Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Customs and Patent Appeals in *United States* v. *Zenith Radio Corp.,* Customs Appeal No. 77-19 (July 28, 1977), reported on page 6 of the Customs Bulletin and Decisions of August 17, 1977.

INTEREST OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION

The Committee to Preserve American Color Television (hereinafter "COMPACT") is an unincorporated association comprised of industry and labor organizations created to seek, primarily through legal action under the Trade Act of 1974, an end to the flood of Japanese color televisions now being imported into the United States. COMPACT filed a petition for import relief with the United States International Trade Commission on September 22, 1976, which lead to the successful negotiation of an orderly marketing agreement between the United States and Japan limiting the number of color televisions that can be imported from Japan during the next three years.

The industry members of COMPACT include: Corning Glass Works and Owens-Illinois, Inc., two major suppliers of glass for television picture tubes; and Wells-Gardner Electronics Corporation, a manufacturer of private label television sets for retailers.

The labor members of COMPACT include: the Allied Industrial Workers of America International Union (AIW), the American Flint Glass Workers Union of North America (AFGW), the Communications Workers of America (CWA), the Glass Bottle Blowers' Association of the United States and Canada (GBBA), the Independent Radionic Workers of America (IRWA), the International Association of Machinists (IAM), the International Brotherhood of Electrical Workers (IBEW), the International Union of Electrical, Radio and Machine Workers (IUE), the United Furniture Workers of America (UFWA),

and the United Steelworkers of America (USW). The Industrial Union Department of the AFL-CIO, a trade union organization which provides services to affiliated unions and their members is also a COMPACT member. All of the labor union members of COMPACT, with the exception of the Independent Radionic Workers of America, are members of the AFL-CIO.

The labor union members of COMPACT represent workers who are or were employed by all of the current United States television manufacturers and many of the companies which manufacture components incorporated into television sets. The IRWA, the IAM, the IUE and the IBEW represent Zenith workers at four plants located respectively in Chicago and Melrose Park, Illinois, Evansville, Indiana, and Springfield, Missouri. Although these four unions have a direct interest in this action, COMPACT's other members' interest is equally significant since the outcome of this litigation will not only affect Zenith and its workers but the entire domestic consumer electronics industry. As will be developed later in this brief, the future of this once healthy industry is in jeopardy and is dependent on the decision in this case.

STATEMENT OF THE CASE

Zenith Radio Corporation (hereinafter "Zenith") filed a petition with the Commissioner of Customs on April 3, 1970, seeking the assessment of countervailing duties on television and other consumer electronics products being imported from Japan. The petition asserted that the Japanese tax system which exempts exports from a commodity tax conferred a "bounty or grant" within the meaning of the countervailing duty

statute. Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C.A. § 1303 (Supp. 1977). After six years of inaction and only after Congress amended the countervailing duty statute requiring a decision to be published, did the Secretary of the Treasury decide that "no bounty or grant is being paid. . . ." 41 *Fed. Reg.* 1298 (1976).

Zenith filed suit in the Customs Court to challenge this determination pursuant to the recently amended section 516 of the Tariff Act of 1930. 19 U.S.C.A. § 1516(d) (Supp. 1977). The Customs Court unanimously held the Japanese scheme of exempting exports from the commodity tax was, as a matter of law, a "bounty or grant" under the provisions of 19 U.S.C.A. § 1303 (Supp. 1977) and that countervailing duties must be assessed against exports benefiting from the exemption. *Zenith Radio Corp.* v. *United States,* 430 F. Supp. 242, 78 Cust. Ct. , (1977).

On April 15, 1977, the United States filed an appeal with the Court of Customs and Patent Appeals which reversed the judgment of the Customs Court in a three to two decision. *United States* v. *Zenith Radio Corp.*, F.2d , 64 CCPA , Customs Appeal No. 77-19 (July 28, 1977). Chief Judge Markey stated that the decisions of this Court in *Downs* v. *United States,* 187 U.S. 496 (1903) and *Nicholas and Co.* v. *United States,* 249 U.S. 34 (1919) relied on by the court below, were not dispositive of the issue because the relevant language was dicta. *Id.* at 10-11. The decision looked to the Treasury Department's established practice of not countervailing against tax exemptions like those of the Japanese and found Congressional acquiescence to this

practice. *Id.* at 24. Further, the opinion concluded that every decision as to whether a particular practice confers a bounty or grant is essentially a factual/economic one and cannot be resolved by courts "woefully ill-equipped to undertake unaided the complex economic analyses required to determine whether a bounty or grant has in fact been conferred. . . ." *Id.* at 14.

Judge Miller, with Judge Baldwin concurring, dissented. Judge Miller found *Downs* to be controlling notwithstanding the administrative practice, determined there was no congressional acceptance of the Treasury practice and pointed out that the underlying issue in the case is one of law, not of fact.

REASONS FOR GRANTING THE WRIT

This case will have a substantial economic impact on Zenith Radio Corporation, COMPACT's members and the remaining segments of the domestic consumer electronics industry. However, the importance of the issues raised extends far beyond the immediate factual situation at bar, broadly affecting the ability of import-sensitive domestic industries to survive unfair competition from foreign producers and the interaction between Congress, the judiciary and the Executive Branch.

This brief will focus on two issues. First, many industries including the domestic consumer electronics industry have suffered from the injury inflicted by foreign producers subsidized by their governments. It is therefore critical that this Court resolve the issue of whether indirect taxes are bounties or grants within the meaning of the countervailing duty statute since Japan, Europe and other major suppliers of the U.S.

market engage in such export subsidies on a broad range of products.

Second, if the Court of Customs and Patent Appeals' ruling is upheld, American manufacturers will be denied their right to judicial review because the appellate court has given unwarranted discretion to the Executive Branch in determining the scope of the countervailing duty statute and has abdicated the responsibility expressly mandated by Congress to interpret the statute according to Congressional intent.

I. Resolution of the Countervailability of Indirect Taxes Is Critically Important to American Industries Suffering From Such Unfair Import Competition

Judicial interpretation of the scope of the countervailing duty statute as it applies to remission of indirect taxes such as the Japanese commodity tax is urgently needed by import-sensitive industries whose survival is jeopardized by the continuation of these unfair trade practices.

That the American consumer electronics industry has been severely injured by the aggressive assault of low-priced imports has been demonstrated by the seriatim loss of these markets in recent years. Virtually all of the radios and tape recorders sold in this country last year were produced abroad. In addition, imports captured 65 percent of the phonograph and hi-fi component market and more than 70 percent of the black and white television set market by 1976. U.S. Industrial Outlook 1977, "Electronic Equipment and Components" ch. 31, 1977. When imports increased their share of color television consumption from 18 percent to 36.5 percent in a brief 12-month period, it became clear that

this last remaining segment of the U.S. consumer electronics industry was also targeted for the destruction inflicted on other electronic products. U.S.I.T.C. Pub. 808, "Television Receivers, Color and Monochrome, Assembled or Not Assembled, Finished or Not Finished, and Subassemblies Thereof" A-90 (Mar. 1977).

To forestall this fate, the Committee to Preserve American Color Television filed a petition for import relief pursuant to section 201 of the Trade Act of 1974, 19 U.S.C.A. § 2251(a)(1) (Supp. 1977), in September, 1976. After a comprehensive six-month investigation, the U.S. International Trade Commission unanimously determined that imports had seriously injured the domestic color television industry. U.S.I.T.C. Pub. 808, "Televisi n Receivers, Color and Monochrome, Assembled or Not Assembled, Finished or Not Finished, and Subassemblies Thereof" (Mar. 1977).

The ITC's conclusions were supported by alarming facts. In the one-year period between 1975 and 1976, import penetration increased dramatically to almost 40 percent of the U.S. market, threatening the survival of this industry which had seen the number of American manufacturers of television sets decline from 27 to 12 between 1960 and 1976. *Id.* at A-8. The industry's profits were a meager 4.3 percent before taxes last year (*Id.* at A-123) and the number of workers declined by 35 percent in the past five years, which meant that almost 13,000 workers in this industry had lost their jobs as a result of the relentless onslaught of imports. *Id.* at A-117.

Although the President agreed with the International Trade Commission's findings and negotiated an orderly marketing agreement with Japan to restrain

the number of color television sets entering the United States in the next three years, such import relief necessarily treats only the symptoms, rather than the underlying causes of the successful market penetration by foreign producers. By design, section 201 of the Trade Act of 1974 does not require a determination of unfair trade practices nor is the relief under its provisions available for more than a temporary period. 19 U.S.C.A. § 2253(h) (Supp. 1977).

By contrast, the countervailing duty statute is expressly fashioned to deal with the competitive advantage given foreign producers when governments subsidize their operations. 19 U.S.C.A. § 1303 (Supp. 1977). Whenever it is determined that a bounty or grant has been bestowed and for as long as such subsidies continue, duties equal to the extent of the subsidy must be imposed by the U.S. government to protect U.S. industries confronted with this type of unfair competition.

Thus, the issue of whether commodity tax rebates are bounties or grants within the meaning of the countervailing duty statute as asserted by the Zenith Radio Corporation in its complaint to the Department of the Treasury is of critical importance to companies and workers represented by the Committee to Preserve American Color Television. Although the injury suffered by the American television industry is not entirely attributable to the Japanese practice of remitting their commodity tax on exports, the 12 to 15 percent reduction in the price of such goods resulting from the 15 to 20 percent rebate contributes to the Japanese ability to undersell their American competitors. In fact, the International Trade Commission determined in the

1971 television escape clause case that government subsidies gave foreign producers an unfair advantage in the U.S. market. TC Pub. 436, "Television Receivers and Certain Parts Thereof" 6 (Nov. 1971).

Thus, a final determination that remission of commodity taxes are countervailable and the imposition of a countervailing duty on these products will deal with the fundamental problem facing the domestic television industry—that it is forced to compete with foreign producers subsidized by their governments. Moreover, it is not only American television manufacturers who will benefit from such a result. The outcome of this litigation will affect the fates of a broad range of import-sensitive American industries because the Japanese remit commodity taxes on numerous products when such articles are destined for export markets.

In addition, the commodity tax is just one of several indirect taxes which the Department of Treasury has persistently refused to find subject to the countervailing duty laws. The resolution of whether rebate of this indirect tax is a bounty or grant within the meaning of section 303 of the Tariff Act of 1930 will establish clear precedent for determinations involving other indirect tax remissions, such as the value-added taxes rebated on steel exports from Europe.

Since indirect taxes such as the commodity tax and the value-added tax are common export-promotion devices used by Japan and Europe and since remissions of these taxes affect a broad variety of products exported to the United States, a determination of the scope of the U.S. countervailing duty laws will have a significant and far-ranging effect on the ability of American industries such as the U.S. color television

industry to compete with unfair competition from abroad—and ultimately to survive such competition.

II. The Court of Customs and Patent Appeals Abdicated Its Judicial Responsibilities in the *Zenith* Case and Denied Meaningful Judicial Review

Although Congress expressly criticized the Executive Branch's handling of foreign unfair trade practices and specifically reversed the Court of Customs and Patent Appeals' denial of judicial review to domestic manufacturers in countervailing duty cases, the court in the instant case has effectively thwarted the Congressional mandate to review negative Treasury determinations when the scope of the countervailing duty statute is at issue.

As indicated in the statement of purposes of the Trade Act of 1974, one of the primary objectives of this legislation was "to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition. . . ." 19 U.S.C.A. § 2102(4) (Supp. 1977). The Senate Finance Committee sharply chastised "the Executive's unwillingness to enforce U.S. trade statutes in response to foreign unfair trade practices" and accused the Administration of "actually foster[ing] the proliferation of barriers to international commerce" because it pursued "a soft trade policy" and refused "to strike swiftly and surely at foreign unfair trade practices." S. Rep. No. 93-1298, 93d Cong., 2d Sess. 11 (1974). In the view of the Committee, "the United States can no longer afford to stand by and expose its markets, while other nations shelter their economies . . . with export subsidies . . . and a host of other practices which effectively discriminate against U.S. trade and production." *Id.* at 19.

Congress thus took steps to compel expeditious and effective action against the illegal trading practices of foreign producers. It granted express authority to retaliate against unjustifiable and unreasonable trade barriers in section 301 of the Trade Act which the Senate Finance Committee urged should not be "a dead letter" because "[f]oreign trading partners should know that we are willing to do business with them on a fair and free basis, but if they insist on maintaining unfair advantages, swift and certain retaliation against their commerce will occur." S. Rep. No. 93-1298, 93d Cong., 2d Sess. 164 (1974). In addition, Congress imposed firm statutory deadlines for antidumping actions, 19 U.S.C.A. § 160 (Supp. 1976), and actions against unfair methods of competition filed pursuant to section 337 of the Trade Act. 19 U.S.C.A. § 1337(b)(1) (Supp. 1977).

But perhaps most pertinently, Congress was determined to reinvigorate the countervailing duty statute and ensure that American industries were not placed at a competitive disadvantage because of subsidies provided by foreign governments. As noted by the Senate Finance Committee Report, "the administration of the countervailing duty law has been subject to considerable criticism," S. Rep. No. 93-1298, 93d Cong., 2d Sess. 183 (1974), stating:

> Although the present statute is, by its terms, mandatory, there is no period stipulated within which the Secretary of the Treasury must make his determination as to whether or not a bounty or grant exists. The Committee has been concerned over the past years that the Treasury Department has used

> the absence of time limits to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the clear and mandatory nature of the countervailing duty law. *Id.*

Therefore, "[i]n order to assure that the interests of American producers will be protected from the adverse effect of trade-distorting foreign export subsidies," Congress "restructured" the administration of the countervailing duty statute, providing mandatory deadlines, publication of preliminary and final determinations and most significantly the express right to judicial review of negative decisions. *Id.*

Yet, the Court of Customs and Patent Appeals, in denying the countervailability of the commodity tax remissions in the *Zenith* case, undermines the Congressional intent evidenced in the Trade Act of 1974 to compel a more aggressive policy toward foreign government subsidization and, in yielding to the Executive Branch, displays the oversensitivity to political considerations which Congress hoped to eliminate in these cases. In abdicating the judicial responsibilities imposed by the Congress, the appellate court effectively denied American manufacturers their right to judicial review.

The history of this particular provision clearly bears this out. Prior to the enactment of the Trade Act of 1974, an American manufacturer sought judicial review of a negative Treasury determination concerning the exemption of one type of lead product from an export tax applied to other lead product exports from Mexico. In *Hammond Lead Products, Inc.* v. *United States*, 440 F. 2d 1024 (C.C.P.A. 1971), the Court of Customs and Patent Appeals held that domestic pro-

ducers did not have a right to seek judicial review of Treasury countervailing duty determinations and that such decisions were exclusively committed to the discretion of the Secretary.

The court justified its conclusion by stating that Congress had "elect[ed] to rely on executive discretion to avoid making the United States ridiculous by penalizing imports from foreign countries." *Id.* at 1031. However, perhaps more truthfully, the Court admitted that it was loathe to tackle the complex economic issues involved, acknowledging that "the question whether an indirect bounty or grant is paid does not lend itself to legal answer without the help of other disciplines." *Id.* Thus, the court decided that the imposition of countervailing duties must be left to the "expertise" of the executive to make what the court perceived as "decisions, not necessarily partisan political, but political in a broad sense. . . ." *Id.*

The *Hammond Lead* decision was promptly and vigorously criticized. E.g., 4 Law and Pol. Int'l Bus. 146 (1972); Note, 12 Va. J. Int'l L. 277 (1972); and Note, 7 Tex. Int'l L. J. 272 (1972). Congress took action in the Trade Act of 1974 to overrule the result. Section 516 of the Tariff Act of 1930, 19 U.S.C.A. § 1516(a) (Supp. 1977), was expressly amended to provide American manufacturers the right to challenge Treasury decisions which found foreign government practices not to be bounties or grants within the meaning of the countervailing duty statute. As the Senate Finance Committee Report put it, the amendment was needed "so as to assure effective protection under the countervailing duty laws to American producers. . . ." S. Rep. 93-1298, 93d Cong., 2d Sess. 185 (1974).

Yet, the court in the *Zenith* case has effectively denied the reviewability expressly mandated by Congress. Although granting subject matter jurisdiction, the court avoided its judicial responsibility to interpret the law according to Congressional intent and to scrutinize whether the agency had a rational basis for its determination.

Thus, the court did not even review the record to determine if there was any evidence to support Treasury's administrative practice of finding the remission of indirect taxes not subject to the countervailing duty laws. Convinced that "the economic result of the foreign government's action . . . controls whether or not a bounty or grant has been conferred," *United States v. Zenith Radio Corp.*, F.2d , 64 CCPA , Customs Appeal No. 77-19, 14 (July 28, 1977), the court then acknowledged that the "language of § 303 . . . requires a factual inquiry" (*Id.*) but laments the fact that courts "are woefully ill-equipped to undertake unaided the complex economic analyses required to determine whether a bounty or grant has in fact been conferred as a result of a particular governmental action." *Id.*

Apparently overwhelmed by the prospect of such a task, the court then pointed out that "the record is silent regarding the economic result of the mere remission of the Japanese Commodity Tax." *Id.* at 15. Finding that to be a virtue in the instant case, the court concluded that "[t]he Secretary has presumably determined that the economic result here is not the conferring of such a benefit. . . ." *Id.* The court then declared that the "factual underpinnings of the Secretary's negative countervailing duty determination in

this case are not under attack" and that the sole question is "whether the mere remission of the Japanese Commodity Tax must be deemed a bounty or grant as a matter of law." *Id.*

Thus, the court does not merely defer to ostensible administrative expertise, it eagerly surrenders to it. Although other courts routinely deal with complicated factual matters and, in instances where administrative records are subject to review, require administrative agencies to have a rational basis for their decisions, the Court of Customs and Patent Appeals in the case at bar does not even require evidence in the record, much less evidence that shows some reasonable support for the agency's conclusions. In so doing, the court refuses to do precisely what Congress in the Trade Act of 1974 mandated it should do: review the facts where government subsidization is alleged and determine whether such a situation was intended by Congress to fall within the scope of the countervailing duty statute.

Instead, the CCPA avoids its judicial functions and leaves the final determination to the Department of the Treasury, thereby permitting the Executive Branch to be the ultimate arbiter of the scope of the countervailing duty statute. In the words of the court: "Until lawfully changed, the administrative practice of the Treasury Department, in uniformly considering a non-excessive remission of an excise tax as failing to constitute a bounty or grant, must stand as a lawfully permissible interpretation of § 303." *Id.* at 32.

Such a conclusion is more readily understood when it is noted that the court views the countervailing duty statute as a foreign policy or political tool and not primarily an economic weapon designed to protect Ameri-

can industry from unfair import competition. In perhaps its most revealing statement, the court points out that "[s]uch assessment [of countervailing duties] is not just a means of protecting our producers, as Congress has recognized in refusing to require proof of injury before making such assessment; it is also one of the chips in a game played by governments on a world stage." *Id.* at 17.

By such a posture, the Congressional mandate to provide meaningful judicial review to American manufacturers who receive negative decisions from the Department of Treasury is rendered completely ineffectual. Although now given standing to sue, domestic companies are in reality denied their day in court if an administrative agency is allowed to interpret the law without accountability. The Court of Customs and Patent Appeals has thereby left American industries virtually remediless against foreign export subsidies which the Executive Branch, rather than Congress, has chosen to treat as not countervailable.

CONCLUSION

For these reasons, the Committee to Preserve American Color Television as amicus curiae respectfully urges the Supreme Court to grant Zenith Radio Corporation's petition for certiorari.

Respectfully submitted,

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